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No. 78-1145

In the Supreme Court of the United States

OCTOBER TERM, 1978

CAPTAIN JERRY D. CONAWAY, PETITIONER

v.

CLIFFORD L. ALEXANDER, JR.,
SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. G). The opinion of the district court (Pet. App. F-1 to F-71) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1978. The petition for a writ of certiorari was filed on January 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was separated from the Army in violation of the Due Process Clause of the Fifth Amendment or of Army regulations.

2. Whether the decision of the Army Board of Correction of Military Records was arbitrary and capricious.

STATEMENT

In 1975 petitioner, an Army Reserve officer on active duty as a captain, brought disciplinary proceedings against an enlisted woman under his command, whereupon she accused him of prejudice growing out of his personal relations with her. After investigation, petitioner's battalion commander concluded that the punishment that petitioner had sought for the soldier was not warranted by the offense she was alleged to have committed. Petitioner was then relieved of command (Pet. App. F-1).

An Officer Efficiency Report was prepared, which was uncomplimentary to petitioner because of these incidents. After being forwarded to him for comment, it was then placed in his personnel records along with his comments. Subsequently, a Letter of Reprimand was put into petitioner's record. Petitioner then appealed the Officer Efficiency Report to the Army Special Review Board and the Letter of Reprimand to the Army Suitability Evaluation Board. Both appeals were denied (Pet. App. F-1 to F-2).

Thereafter, petitioner was selected for release from active duty by the Army Active Duty Board pursuant to paragraph 3-58, AR 635-100 (see 10 U.S.C. 681(a); Pet. 14-17). He was released from active duty on June 3, 1976 (Pet. App. F-2). His service was characterized as honorable (Pet. App. F-6).

Petitioner filed suit in the United States District Court for the Middle District of Alabama, asking the district court to vacate the Active Duty Board's decision and to order him reinstated on active duty. Holding that petitioner must exhaust his administrative remedies by filing an application with the Army Board for Correction of Military Records (ABCMR),[1] the district court dismissed his suit without prejudice to refiling upon completion of the exhaustion process.[2]

The ABCMR denied petitioner's application for relief on the ground that "insufficient evidence has been presented to indicate probable material error or injustice" (Pet. App. B, C, & D). Upon petitioner's refiling of his action, the district court granted summary judgment for the Army, holding that the ABCMR had not acted arbitrarily and capriciously. The court concluded that petitioner had been separated properly under 10 U.S.C. 681(a) and Army Regulation 635-100; that the procedures used in separating petitioner did not offend the Due Process Clause; and that "[t]he records presented here clearly reflect there was sufficient evidence before the ABCMR from which it could have concluded that [petitioner] had shown a serious lack of judgment which justified his discharge" (Pet. App. F-6). The court explained that "[i]t was * * * reasonable for [the Board] not to overturn the discharge, even assuming that some regulations had been violated in the earlier consideration of the matter" (*ibid.*).

The court of appeals affirmed on the basis of the opinion of the district court (Pet. App. G).

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[1]The ABCMR is a board of civilians established by the Secretary of the Army pursuant to 10 U.S.C. 1552 to "correct any military record * * * when * * * necessary to correct an error or remove an injustice." The ABCMR had authority to grant petitioner full relief (Pet. App. F-6).

[2]Petitioner's request for an order temporarily restraining the Army from separating him was denied, and petitioner was released from active duty on June 3, 1976. Following his release from active duty, petitioner re-enlisted in the Army as a Sergeant (Pet. App. F-2 n.1). We are advised that petitioner remained on active duty as a non-commissioned officer until he completed twenty years of active federal service, at which time he was retired from the Army under the provisions of 10 U.S.C. 3911 in the grade of Captain.

ARGUMENT

Traditionally, civil courts have been unwilling to second guess judgments requiring military expertise, and have steadfastly refused to interfere with promotion orders, duty assignments, officer effectiveness reports and similar determinations made by the military regarding its own personnel. *E.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953). An officer's qualifications for retention on active duty are particularly inappropriate for judicial oversight. *Mindes* v. *Seaman*, 501 F. 2d 175 (5th Cir. 1974); *Pauls* v. *Secretary of the Air Force*, 457 F. 2d 294 (1st Cir. 1972); *Payson* v. *Franke*, 282 F. 2d 851, 854 (D.C. Cir. 1960), cert. denied, 365 U.S. 815 (1961). Petitioner has not demonstrated any sufficient basis for departing from these principles here.

As a reserve officer, petitioner was subject to release from active duty under the provisions of 10 U.S.C. 681(a) as implemented by paragraph 3-58, Army Regulation 635-100 (Pet. 14-17).[3] Paragraph 3-58a provides that the records of officers on active duty "will be screened annually at Headquarters, Department of the Army, * * * to determine those officers whose degree of efficiency and manner of performance require relief from active duty * * *" (Pet. 14-15). The regulation provides further that an officer may not be released from active duty until the ninetieth day after he receives notice of his selection for release. Paragraph 3-58d, Army Regulation 635-100 (Pet. 15-16).

Notwithstanding petitioner's allegations to the contrary, the district court determined that the Active Duty Board which considered petitioner for release from active duty was properly authorized and instructed to do so and that,

[3] 10 U.S.C. 681(a) provides:

> Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty.

in fact, petitioner had received the requisite ninety-day notice prior to his release (Pet. App. F-4 to F-5). There is no reason for this Court to review that essentially factual determination.

2. Petitioner also claims that his release from active duty in the absence of a full hearing amounts to a violation of the Due Process Clause of the Fifth Amendment. This argument is plainly without merit.

The district court determined that petitioner "has made no showing of entitlement to his position in the Army" by reason of his amenability to separation under the provisions of 10 U.S.C. 681(a) and "no showing that any action by the Army will harm [petitioner's] good name, as the Army did not publish the reasons for the release, and did not plan to do so" (Pet. App. F-4). Army regulations entitled petitioner to no rights other than to have his records reviewed by the Active Duty Board. This was done, petitioner was selected for release, and afforded the requisite notice. Courts need inquire no further. *Bishop* v. *Wood*, 426 U.S. 331 (1976); *Sims* v. *Fox*, 505 F. 2d 857 (5th Cir. 1974).

3. Finally, petitioner argues that the district court erred in applying the arbitrary and capricious standard in its review of the administrative record of the ABCMR (Pet. 26-29). Petitioner contends that the district court should have granted relief on the basis that his discharge was illegal because of prior regulatory violations. Petitioner does not identify these violations, assert that they were prejudicial in effect, or, indeed, allege that they had any effect whatsoever on the decision of the Active Duty Board to release him from active duty. His argument is insubstantial.

It is now well settled that the decision of a correction board will be left undisturbed, absent a showing that its action was arbitrary or capricious or unsupported by substantial evidence. *E.g.*, *Hodges* v. *Callaway*, 499 F. 2d

417 (5th Cir. 1974); *Peppers* v. *United States Army*, 479 F. 2d 79 (4th Cir. 1973); *Ragoni* v. *United States*, 424 F. 2d 261 (3d Cir. 1970); *Sanford* v. *United States*, 399 F. 2d 693 (9th Cir. 1968). The ABCMR properly considered petitioner's case, including "the propriety of the adverse Officer Efficiency Report, * * * the Letter of Reprimand, and [petitioner's] release, [and] It found that they were justified" (Pet. App. F-6). The Board concluded that "insufficient evidence has been presented to indicate probable material error or injustice" (*ibid.*). Although brief, the explanation states the reason for the action taken and is tantamount to a finding that any procedural violations claimed by petitioner were not a significant factor in the Active Duty Board's decision to select him for release from active duty.

The district court reviewed the administrative record and concluded that "there was sufficient evidence before the ABCMR from which it could have concluded that [petitioner] had shown a serious lack of judgment which justified his discharge, [and that it] was, therefore, reasonable for it not to overturn the discharge, even assuming that some regulations had been violated in the earlier consideration of the matter" (Pet. App. F-6). We submit that decision was entirely correct and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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